IN THE

# Supreme Court of the United States

OCTOBER TERM 1944

No.

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NATHAN BERGER, SAMUEL KAMINSKY and
SIDNEY E. COHN,

*Petitioners,*

against

UNITED STATES OF AMERICA.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### I

### Opinion Below

The opinion of the Court below has not yet been reported.

### II

### Jurisdiction

The statutes under which jurisdiction is claimed are stated in the petition.

## III

### Statement of the Case

A summary statement of the case has been given in the foregoing petition, and for brevity that statement is not repeated here.

## IV

### Specifications of Error

Without discussing all the errors indicated in the questions presented, as enumerated in the foregoing petition, we may point out here that the Circuit Court of Appeals committed grave error in holding—

(a) That the District Court had power to place Petitioners Berger and Kaminsky on probation, notwithstanding the fact that they were first offenders and a prison sentence could therefore not have been imposed upon them under the provisions of the Fair Labor Standards Act.

(b) That the District Court had power to order, as one of the conditions of such probation, that Petitioners Berger and Kaminsky, jointly and severally, pay the sum of $27,094.08 to the employees of Promenade Clothes, Inc., and without naming the persons to whom payment should be made and in what amounts, delegating the decision as to the persons who were to share in the fund, and the extent to which they were to share therein, to the Administrator of the Wage & Hour Division.

(c) That the District Court had power to order, as a condition of such probation, that Petitioners Berger and Kaminsky pay as alleged "restitution" a sum of money greatly in excess of the loss sustained or damage caused by the offenses to which they had pleaded guilty to the persons aggrieved thereby.

(d) That the District Court, after both the period of probation and the time for which a person could be sentenced to imprisonment under the Fair Labor Standards Act had expired, had jurisdiction of the case, and the power to order the distribution of a fund which Petitioners Berger and Kaminsky had voluntarily deposited in a bank, in an effort to pay the legitimate claims of the employees of Promenade Clothes, Inc. for underpayment under the Fair Labor Standards Act.

(e) That the District Court not only had jurisdiction over the case and the power to order the distribution of such fund, but that it could order the distribution thereof contrary to the terms upon which it was deposited, namely, that both of the persons to whose credit it was deposited should be reasonably satisfied that the distributees were persons entitled to share therein under the provisions of the probation order.

(f) That the District Court had power to order the distribution of the said fund to persons whose claims were disputed by Petitioners Berger and Kaminsky, without any proof before the Court that the persons to whom the Administrator of the Wage & Hour Division ordered distribution of the same were actually entitled to share therein to the extent to which payment to them was directed by the Administrator.

(g) That the District Court had the power to order the distribution of the fund to the persons and in the amounts requested by the Administrator of the Wage & Hour Division, in the face of uncontroverted proof presented to the Court that at least some of the persons included in the "allocation" were not only not entitled to share in the fund, but were not members of the class of persons to whom "restitution" was directed to be made by the probation order, and to whom "restitution" could not have been ordered by reason of the fact that they were not persons coming within the purview of the Fair Labor Standards Act.

(h) That the District Court had jurisdiction over Petitioner Cohn, and the power to order him, on pain of punishment as for a contempt of court, to sign checks for the payment of money out of the fund involved herein, contrary to the terms of the private trust voluntarily assumed by him, and in the face of incontrovertible proof that some of the distributees named in the order were not entitled to share in the fund, were not persons of the class designated in the order of probation, and were not "employees" coming within the purview or protection of the Fair Labor Standards Act.

## V

## Argument

### A

### The order made by the District Court violated the due process clause of the Constitution, as well as the constitutional provision for trial by jury.

The Court below brushed aside the constitutional questions raised by Petitioners as so devoid of merit as not not to deserve any discussion. We respectfully submit that in so doing the Court below completely misapprehended the nature of the questions involved.

It must be borne in mind, in the first place, that the money in the fund involved was not a fine. It was not directed to be paid to the United States, but to a class of persons to whom money was supposed to be due from Promenade Clothes, Inc. by reason of an alleged wrong committed against them. It will be conceded that the Court could not order the payment of money as alleged "restitution" unless money was so due. The Federal Probation Act provides that, as a condition of probation, the Court may require the defendant "to make restitution or reparation to the aggrieved party or parties for actual damage or loss caused by the offense for which conviction

was had". This provision of the statute expressly limits the payment as "restitution" to the loss or damage which had been established to have been caused or sustained by the aggrieved party by the conviction itself. It is because of this that, as will be seen further below, whenever the question was raised either in a Federal or a State court, it has been held that no payment by way of "restitution" can be ordered, except to the person wronged by the specific offense of which the defendant was convicted, and only to the extent of the loss or damage caused by that specific offense. To order more than that would mean the ordering of payment of money without an adjudication that the money was due. *A fortiori*, can no payments be directed to a large class of persons as to whose alleged damage or loss there had been neither trial nor adjudication.

Assuming for the moment that a court has the power, because of its jurisdiction over a defendant as a probationer (which was not the situation in the case at bar,—since the period of probation and the time of jurisdiction provided by statute had both expired) to inquire into and adjudicate upon the defendant's similar wrongs to persons other than those involved in the specific offense of which conviction was had, it clearly could not order any payment without some proof (and that means proof in the record, which a court of review could examine) that the sums of money directed to be paid were actually due to the persons to whom payment was directed to be made, as loss caused or damage sustained by reason of offenses similar to the offense of which the defendant was convicted. To order payment without such proof and adjudication is clearly contrary to the constitutional guaranty of due process.

And it is equally clear that the order affirmed by the decision sought to be reviewed deprived Petitioners Berger and Kaminsky of the right to trial by jury, since not only the aggregate amount involved, but a large number of the individual sums directed to be paid by the order of the

District Court were within the constitutional provision for trial by jury. Here again we must bear in mind that the reason "restitution" may be directed by a probation order without a further trial as to the loss sustained or damage caused by the offense of which the defendant stands convicted, is that such trial has already been had. The conviction itself was the result of a trial in which the defendant had been proven to have caused the damage or loss sustained by the "aggrieved party". But when the Court assumes to impose as alleged "restitution" the payment of sums of money not involved in the conviction had, there is not only no due process if the payment is directed without a trial of the special issue involved in such payments, but there is clearly a violation of the provisions of the Constitution guaranteeing trial by jury if the amount directed to be paid is within the constitutional protection of trial by jury.

B

**The District Court had no power to place Petitioners Berger and Kaminsky on probation.**

We respectfully submit that the District Court was wholly without power to place Petitioners Berger and Kaminsky on probation; and consequently had no power to impose "restitution" as one of the conditions of such probation.

An examination of the history of the problem of probation, and of the adjudications of the courts under probation statutes, including the decisions of this Court under the Federal Probation Act, clearly demonstrates that the intention of the lawmaker was that probation should only be imposed *as an alternative to imprisonment*, and that the statute does not permit probations,—*which is a limited imprisonment in fact and complete imprisonment in theory of law*,—where the offense was such that the Court had no power to sentence the defendant to imprisonment.

Probation is actually imprisonment within what has, in other connections, been called "jury limits", instead of within the four walls of the prison itself. We do not think it is necessary to go into an extended discussion of the history of the Act or an examination of the many cases decided thereunder, and we shall therefore only refer to two cases decided in this Court.

*United States* v. *Murray*, 275 U. S. 347.
*Burns* v. *United States*, 287 U. S. 216.

In the first case cited this Court quoted with approval from the Report of the Committee on the Judiciary of the House of Representatives the following statement:

> "Probation is the method by which the Court disciplines and gives an opportunity to reform to certain offenders without the hardship, the expense, and the risk of subjecting them to imprisonment."
>
> *United States* v. *Murray*, 275 U. S. 347, 355.

And in the second case cited this Court, giving its own opinion on the subject, said:

> "It (the Federal Probation Act) was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation, *which actual service of the suspended sentence might make less probable.*"
>
> *Burns* v. *United States*, 287 U. S. 216, 220.

C

**The District Court had no power to delegate the "allocation" of "restitution".**

Assuming for the moment that the District Court had the power to order "restitution" beyond the sum due to the parties mentioned as aggrieved by the specific offense

charged in the first eight counts of the Information, it is clear that the District Court could not delegate that power to anybody else. The ordering of "restitution" to others than the persons and for the amounts involved in the first eight counts of the Information involves an adjudication that the amounts were due. *That is clearly a judicial function which no one but a court could perform.*

Such a delegation, we respectfully submit, is wholly void,—unless made under statutory authority and with provision for judicial review. It was void in the original order. And it was void in the second order (assuming that the District Court had jurisdiction of the defendants, which it did not),—because it was not made in pursuance of any statutory authority nor based on any proof submitted to the Court, but in terms was merely a direction to pay "allocations" made by someone else.

**D**

**The District Court was wholly without jurisdiction over Petitioners Berger and Kaminsky at the time of the making of the order affirmed by the decision sought to be reviewed.**

The Federal Probation Act specifically provides that restitution may only be directed to be made by the defendant "*while on probation*". In this case the period of probation was eighteen months, and had expired long before the order in question was made by the District Court. The Probation Act also provides that before the expiration of the period of probation or within the period for which the defendant *could have been sentenced to imprisonment,* the District Court may, in case of a violation of the terms of probation, bring the defendant before itself, revoke the probation, and impose sentence.

Aside from the fact that this clearly proves,—if further proof were necessary,—that probation can only be ordered where sentence of imprisonment could be imposed,—the provision places a limit upon the jurisdiction of the Dis-

trict Court measured by the term for which imprisonment could have been imposed. The maximum term of imprisonment prescribed by the Fair Labor Standards Act (in cases where imprisonment may be imposed thereunder,—i.e., in case of second offenders and beyond) is *six months*. That period had, of course, expired long before the questioned order was made. The District Court had therefore completely lost jurisdiction over the Petitioners Berger and Kaminsky and over the case before it made the order affirmed by the decision sought to be reviewed.

E

**The District Court had no jurisdiction over Petitioner Cohn.**

Petitioner Cohn came into the case as a result of a voluntary private arrangement between Petitioners Berger and Kaminsky and the Wage & Hour Division when the District Court refused to accept the money tendered by them in attempted compliance with the order of probation. In offering the money into court Petitioners Berger and Kaminsky had a right to assume, and undoubtedly did assume, that the Court would not pay any part thereof except to persons entitled to payment under the provisions of the Fair Labor Standards Act. And the Court refused to accept the money tendered, because it did not want to assume the burden of making such determination, involving, as it did, the trial of many claims. Under the circumstances, Petitioners Berger and Kaminsky having expressed a willingness to pay any legitimate claims under the Fair Labor Standards Act to the employees of the corporation of which they were or had been officers, the money was deposited in a bank to the order of their attorney and the attorney for the governmental agency interested in the prosecution, upon the specific understanding that the attorneys would examine into and determine the questions of fact involved, and pay the legitimate claims of Promenade's employees under the Fair Labor Standards Act.

It must be borne in mind that *no order was ever made* by the Court, either directing the deposit to be made or appointing Petitioner Cohn as one of the holders of the deposit. The functions assumed by Petitioner Cohn in connection with the deposit were wholly voluntary and extra-judicial, in an honest effort to use the fund for the satisfaction of honest claims of persons belonging to the class described in the probation order.

This did not make the deposit a deposit into court, nor did it make Petitioner Cohn a court functionary or a person performing duties and under appointment by a court. What the two attorneys undertook was to act as the trustees of an express trust created by a private arrangement in order to carry out a purpose which a court had indicated ought to be accomplished, but for the accomplishment of which it had declined to use its power or machinery. In this situation, we respectfully submit, their action was not subject to the control of the Court; although they might be subject to suit by the persons for whose benefit the trust was created if they acted contrary to the terms of the trust. Probably, also, the persons for whose benefit the fund was created could come into court and demand its distribution in a proper suit. But until such a suit were brought, the District Court was wholly without jurisdiction either over the fund or Petitioner Cohn.

Assuming, however, that the District Court had jurisdiction over the fund, it is clear that all it could do in the circumstances would be to declare Petitioner Cohn's office as trustee vacant; and itself assume the distribution of the fund in a proper proceeding and under proper protection to the rights of Berger and Kaminsky.

We respectfully submit that under no circumstances could the District Court direct Petitioner Cohn to act contrary to his own conscience as well as the terms of his trust, on pain of being punished as for a contempt of court in case of non-compliance.

F

**The District Court was wholly without power to order the payment of the sum involved as "restitution".**

We respectfully submit that upon general considerations as well as authority it is beyond question that the District Court was without power to order "restitution" except of the few paltry sums involved in the first eight counts of the Information. Passing the constitutional question involved, unless the amounts to be paid were determined in a separate suit, or in some proceeding ancillary to the criminal prosecution for which there was specific statutory provision, it is clear that the statute itself limits the power of the District Court to order restitution to the loss or damage caused by the specific offense charged in the indictment or information under which the defendant was convicted or to which he pleaded guilty. And it was specifically so held by Judge Maris of the United States Circuit Court of Appeals for the Third Circuit sitting in the District Court for the Eastern District of Pennsylvania, in the case of *United States* v. *Follette* (32 Fed. Supp. 953).

In that case the defendant, one Marguerite Follette, was charged in the indictment with embezzlement and conversion of $203.99 of United States postal funds, while an employee of the United States Government. She pleaded guilty to the charge, and it was established that she had actually stolen $466.28, which she promised to repay, and it was therefore made a condition of her probation. The matter came before Judge Maris upon an application to extend the probation period, when for the first time, two questions were raised—one, whether restitution could be made a term of the probation in this case at the request of the National Surety Company, which had paid to the United States Government the amount of the defalcation; and, if such an order could be made, whether it could direct payment beyond the amount of the embezzlement of which the defendant stood convicted. Judge Maris decided

the first question in the affirmative and the second question in the negative, and accordingly ordered the probation order modified by reducing the amount of the restitution to the amount involved in the crime of which the defendant stood convicted. In disposing of these questions Judge Maris said:

> "The first of these questions is whether the Court has power to impose as a condition of probation restitution to the defendant's surety of sums which it has paid in making good the defendant's defalcations. The power of the Federal Courts to suspend the execution of sentence and admit a defendant to probation is conferred by the Federal Probation Act. It will be seen from the last paragraph of section 1 of the act, 18 USCA, section 724, that when restitution is made a condition of probation, it may only be ordered to be made to 'an aggrieved party and for actual damages or loss caused by the offense for which conviction was had'. Although the first paragraph of the section authorizes the courts to place defendants on probation 'upon such terms and conditions as they may deem best', I think it clear that this general language is limited by the later specific provision so far as restitution is concerned.
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> "The question, therefore, resolves itself into whether a surety is 'an aggrieved party' within the meaning of the act so that an order of restitution may properly be made in its favor. * * *
>
> "The second question for my consideration relates to the amount of restitution which may be ordered. It is said that the court does not have the power to order restitution in an amount greater than the amount involved in the particular offense for which the defendant has been convicted. Whereas great latitude is given by the act to the judge to fix such terms and conditions as to him may seem best, his right to order restitution may only be 'for actual damages or loss caused by the offense for which conviction was had.' *It seems to me that just as a court which is given the power to impose a fine may do so only within the limits fixed by the penal statute, so the order to make restitution must be kept within the limits set in the phrase just quoted.*

"In the present case the offense charged in the indictment to which the defendant pleaded guilty, 'for which conviction was had', was the embezzlement and conversion of $203.99. A conviction for embezzlement and conversion of a greater sum could not have been had on this indictment. *I conclude, therefore, that the condition for restitution in this case must be modified so as to relate to the embezzlement of $203.99 only,* credit being given for the partial restitution heretofore made."

*United States* v. *Follette,* 32 Fed. Supp. 953, 954-955.

It is suggested by the decision sought to be reviewed that even if this point were well taken, it is too late to raise it now, after the period for appeal has expired. We respectfully submit that the learned Circuit Court is clearly in error. Where a criminal court is without power to impose the sentence actually imposed because the statute does not provide for so large a sentence, the sentence, insofar as it exceeds the limitations imposed by the statute under which it is pronounced, is wholly void for want of jurisdiction. Usually this question arises in cases of imprisonment, and it is well settled law that in such cases the defendant may sue out a writ of *habeas corpus* after he had served the maximum sentence which the Court could have imposed.

*Ex parte Wilson,* 114 U. S. 417.
*Ex parte Lange,* 18 Wall. 163.
*Hill* v. *United States,* 295 U. S. 460.
*Ex parte Watkins,* 7 Pet. 568.
*Re Banner,* 151 U. S. 242.
*People ex rel. Tweed* v. *Liscomb,* 60 N. Y. 559.
*Cf. Matter of Morhous* v. *N. Y. Supreme Court,* 293 N. Y. 131.

Besides, in this case there was no effective order until the questioned order was made. And, in any event, a new

order attempting to enforce an order which the Court was powerless to make in the first instance,—the last order in itself being concededly appealable,—cannot be sustained.

The Circuit Court of Appeals, apparently realizing the weakness of its position, suggests as an alternative ground for upholding the District Court that the amount ordered to be paid could be justified as "restitution" under Count XI of the Information, which charged the defendants with failing to keep proper books, or keeping false books. This, on the truly amazing theory that it could be said that loss or damage had been caused to Promenade's employees to the extent of the underpayment, if any, by Promenade's failure to keep proper books. We respectfully submit, with all due respect to the learned Court whose decision is sought to be reviewed, that this is a wholly unwarranted stretching of the statute involved as well as of the English language. If that statement be law, then the District Courts have been clothed with powers undreamed of by the lawgiver and which those courts had never thought they possessed. By way of illustration only: The Bankruptcy Law provides that it is an offense against the United States for any person or corporation to falsify its books or records in contemplation of bankruptcy. If the law laid down in this case by the learned Circuit Court of Appeals is permitted to stand, a District Court, upon the conviction of a bankrupt or of an officer of a bankrupt corporation, of tampering with the bankrupt's books or falsifying the same in contemplation of bankruptcy, could place him on probation, and as an incident thereto order him to pay all of his debts or all the debts of the corporation of which he was an officer.

It will be said, of course, that such a construction of the law would be absurd, since the falsification of the books did not cause the loss or damage which the creditors sustained by the non-payment of their debts, and the debts could be proved without the books. But that is exactly the situation with respect to the employees of Promenade. It is the underpayment that hurt them, and not the falsification of the books.

In view of the extraordinary character of the proposition, it would seem unnecessary to discuss it any further. Nevertheless, we shall point out two considerations which conclusively demonstrate the untenability of the decision. In the first place, the Federal Probation Act specifically provides that restitution must be made only to the "aggrieved" party or parties. There must therefore be a party or parties before the Court who claim to be aggrieved. No such parties appeared before the District Court in this case. No one came into court saying that he or she had been aggrieved either specifically by the failure of Promenade to keep proper books, or generally by underpayment under the Fair Labor Standards Act. On the other hand, *eight persons included in the order for distribution* did appear in court and stated *on the record that they had not been aggrieved in any way either by Promenade or Petitioners Berger and Kaminsky by anything contained in the Information to which they had pleaded guilty.*

And there is the provision of the Fair Labor Standards Act limiting the fine which could be imposed under Count XI of the Information to $10,000. Surely, the amount of restitution ordered without a specific adjudication of the amount due could not exceed the amount of the fine which the Court is authorized to impose. Such indirect method of fining a defendant was clearly not contemplated by those who advocated the great reform involved in the probation system, and is certainly not authorized by the Federal Probation Act. Instead of a reform to be proud of, such an interpretation of the Act would make an engine of oppression.

## C

### Petitioners Berger and Kaminsky were vitally interested in the proper distribution of the fund involved.

All of which brings us back to the real point in dispute between the Petitioners and the Wage & Hour Division,—namely, *the proper distribution of the fund involved.* As

already stated, and as the record abundantly proves, the reason the power of the Court to require restitution in the amount named in the probation order was not questioned at the time, was, that Petitioners Berger and Kaminsky had no objection to paying the legitimate claims of Promenade employees under the Fair Labor Standards Act. Promenade Clothes, Inc. is a small corporation, largely, if not wholly, owned by Petitioners Berger and Kaminsky. The employees of Promenade had a right of action under the Fair Labor Standards Act for any underpayment, and Petitioners Berger and Kaminsky were therefore interested that such claims be satisfactorily disposed of. They therefore apparently had no objection to the payment provided for in the probation order. They had a right to assume that the order would be strictly complied with and only legitimate claims under the Fair Labor Standards Act would be paid as "restitution" under the order.

When the Court refused to accept the money offered by them they were willing to enter into a private arrangement to accomplish the same purpose. This they did by means of the deposit with Reyman and Cohn as trustees. And they would now have no objection to the original order if payments were made as provided in the probation order,—that is to say, to persons who presented proof satisfactory to a court (or to the two trustees) that they had legitimate claims under the Fair Labor Standards Act. The dispute arose not because of any unwillingness of Petitioners Berger and Kaminsky to pay such claims, but because of the arbitrary stand taken by the Wage & Hour Division, that it may distribute that fund without regard to the genuineness of the claims presented,—indeed without any claims presented, and *without making provision for the payment of genuine claims.*

The Petitioners Berger and Kaminsky were vitally interested not only that no part of their money should be paid to persons not entitled thereto, *but that the money deposited by them should be used for the discharge of the*

*debts of Promenade,* since if those debts were not discharged out of this fund, the corporation which they owned, or they themselves, would have to pay the same.

To this, we respectfully submit, they were entitled under the Constitution of the United States, as well as under the statutes involved, if properly interpreted. They were entitled to that even under the very terms of the probation order,—which the questioned order purports to enforce, but actually violates. They were certainly entitled to that under the terms of the agreement under which the deposit was made and Petitioner Cohn made co-trustee of the fund.

## Conclusion

This case is clearly one in which great public interests are involved, both because of the constitutional questions raised and the proper administration of two important statutes which are constantly before the courts. A *writ of certiorari* should therefore be granted by this Court to review the decision of the Circuit Court of Appeals, so that a full argument of the many serious questions involved may be had, and judgment directed by this Court in accordance with the constitutional rights of the parties and the proper interpretation of the important statutes involved.

Dated, New York, January 6, 1945.

Respectfully submitted,

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